IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STANDARD ACCIDENT INSURANCE COMPANY, a corporation, *Appellant*, vs. EDNA L. HEATFIELD, *Appellee*.	**No. 10517**

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLANT'S REPLY BRIEF

M. E. MACK,
832 Old National Bank Bldg.,
Spokane, Washington,
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REPLY

IT MUST BE CONCEDED

1. That the Deceased never talked to only two people.

(a) He said to Floy Harrington:
"I have an awful pain. I have a pain in my heart, the first time in my life I ever had trouble with my heart. It was so hot and he got so tired and exhausted he had to lie down. He had been there an hour. He had tried to back up and tried to go forward, but he couldn't go either way. His car was stuck there and he tried to get it out and he couldn't by himself."

On cross-examination the same witness said Deceased said:

"He had been there two hours. He laid down an hour." (R. 70-71-72.)

(b) To Thomas A. Callan Deceased said:
"He had overexerted himself." (R. 109.)

2. It was a very hot day. (R. 72.) He was breathing normally and was not panting or anything. (R. 75.)

3. No one saw him do a thing. (R. 54.)

4. His business was insurance and had been for 26 years. (R. 151.)

5. He operated his own car when he was pulled out of the ditch. (R. 60.)

6. Deceased drove two miles after being pulled out of the ditch before he met and talked to Thomas A. Callan and all he said to him was he overexerted himself. (R. 61.)

7. In every other case there was direct proof of a physical injury. The only question in those cases was, "was it accidental?"

8. The plaintiff's doctors both testified that the autopsy did not disclose that the Deceased overexerted himself. It was necessary to know how much work and labor the man had done. (R. 131, 150.)

9. The man whom Thomas Heatfield, son of deceased, said had informed him where the car was off the road, was Don Abrahams who had never seen the car in the ditch or ever been to the place. (R. 163-164-177.)

10. During the testimony, Thomas Heatfield, the son, exhibits marked by the Notary who took the deposition were *a, b, c, d* being marked at the trial *g, h, l, j* definitely show that they are not even the same side of the road which on examination will readily disclose. (R. 160.)

g shows that the camera was set below the bottom of the picture and shows a straight road ahead;

h shows the camera was set below the bottom of

the picture and shows a decided curve to the right;

i shows that the camera was also set below the picture and shows a decided curve to the left, and that the log is on the right side of the road, while the log in the first picture *g* is definitely on the left side of the road;

j also shows the camera was set below the bottom of the picture and shows a straight road with the curve to the right.

The physical facts by virtue of the pictures show that they could not have been the same picture.

11. Plaintiff endeavors to obviate to avoid the failure to give the notice within the twenty days by pleading in his reply that although "effort had been made by plaintiff to find said policy," it was more than twenty days after the death of said Augustus Heatfield to-wit: on or about August 11, 1942, that the insurance policy was found and placed in her possession and that it was not until said named date that Plaintiff knew the specific provisions of said policy relative to giving notice to the Defendant. In Plaintiff's complaint R-5 is set out e(5) as follows.

With reference to notice as follows:

> "Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been rea-

> sonably possible to give such notice and that notice was given as soon as was reasonably possible."

Appellee's counsel fully realizing the insufficiency of his evidence, unequivocally and willfully mistates the evidence. On page 14 of Appellee's Brief appears the following:

> "When Mr. Heatfield told Mrs. Harrington and Mr. Callan that he had worked hard on the car and that he had overexerted himself, such statements certainly related to the main event."

There is no statement in the record from the beginning to the end that Mr. Heatfield, the deceased, ever at any place and ever told either of those two parties THAT HE HAD WORKED HARD ON THE CAR, and it is the desire of counsel to mislead this court because he recognizes the necessity of the deceased to say that he had done considerable hard work and further because in *Beck vs. Dye,* 200 Wn. 1, the Supreme Court of the State of Washington set out at page 42 of this Brief:

> "(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event."

Obviously, when the Deceased said he overexerted himself, he was not explaining or elucidating the main event or at all. The same necessity of this elucidation or explaining is set forth in *Jones on Law of Evidence,* Section 360, appearing on page

37 of the Appellant's Brief, and under Section 1754, *Wigmore on Evidence,* Third Edition, under the head of "Declaration Must Elucidate the Act." Page 43 of Appellant's Brief.

In *Yarbrough vs. Prudential Life Insurance Company of America,* 99 Fed. 2nd 874, where the statement is "res gestae must spring from the main fact."

In *Chesapeake and Ohio Railway Company vs. Mears,* 64 Fed. 2nd 291, the Fourth Circuit Court of Appellees said at page 292:

> "The res gestae are the statements of the *cause* made by the Assured."

It follows irrevocably that a statement, I overexerted myself was not a statement of the cause, but was a conclusion.

Appelle's counsel, page 11, very definitely states, knowing it to be a fact as follows: "In the Heatfield case no one saw Mr. Heatfield doing any hard manual labor on his car," which is very contradictory of what appears on page 14.

Appellee's counsel entirely overlooks the requirement of notice which is "written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury." (R. 5.)

All Counsel says in Exhibit CR-78, is "assured died near Curlew, Washington, on June 3th." The notice requires written notice of injury, not of death. In Appellant's Brief at pages 35 and 36 it appears conclusively: "But notice of death alone is not sufficient. At least the notice must be such as under the existing circumstances, will by fair construction inform the company that the insured has met death, *through accident.*"

Thompson vs. United States Casualty Company, 6 N.E. 2nd 769;

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A.L.R. 608;

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N.Y.S. 250;

Wachel vs. Equitable Life Assurance, 194 N.E. 850;

Commercial Casualty Company vs. Stimson, 111 Fed. 2nd 63, at page 68;

Lewis vs. Commercial Casualty Co., 121 Atl. 259. The Court of Appeals of Maryland at Page 261 said, the Provision being as follows:

> "Upon the occurrence of the *accident or loss,* the assured shall give immediate written notice *thereof,* with the fullest information obtainable *at the time.*

> "The assured by the first provision of the clause was to give immediate written notice of the accident or *loss* resulting from injury or damage caused by the accident, and in giving that notice he was required to furnish the fullest information obtainable at the time of the accident, not only as to HOW THE ACCIDENT OCCURRED, but also of the injuries from which any loss, covered by the policy, resulted."

DECEASE STATEMENTS INADMISSIBLE

Flannigan vs. Provident Life and Accident Insurance Company, 22 Fed. 2nd 136.

In this case three quarters of an hour after the claimed accident, Deceased made statement, which the Court stated it would be assumed that there was evidence upon which a jury could have based a finding that he came to his death by reason of the accident. At page 139 Fed. 2nd, it has been held by the Supreme Court of the United States that, to be properly admitted as a part of the res gestae, statements should be "necessary incidents of the litigated act * * * and * * * not produced by the calculating policy of the actors."

> "The mere narration of a past occurrence is not a part of the res gestae of that occurrence. This is especially true where the person making the statement sought to be proven is an interested party and has had time to think of the effect of his statement. An opinion of this court discusses this point at some length and is in line with the authorities above quoted."

Abendroth vs. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, at 715, the Appellate Court of Indiana said:

> "Upon entering his home on the evening of March 13, 1913, how long after the accident it is impossible to tell, Dr. Abendroth said, 'I fell,' and afterwards, 'I hurt myself,' and again that he was considerably shaken up. These expressions were offered in evidence, but on objection of appellee they were excluded, and upon this ruling appellant predicates error * * * We hold that such expressions are not expressions of pain, or a part of the res gestae. They were merely narrative of past facts, and not admissible."

The Circuit Court of Appeals, 2nd Circuit, said at Page 484, in 255 Fed. 483, in *Aetna Life Insurance Company of Hartford, Conn. vs. Ryan*:

> "It appears that a witness who assisted in picking him up when he fell in the dining room of the Protectory was asked whether he had any conversation with Ryan after he fell. He replied:
>
> " 'I was near him all the time. He was mumbling to me and the brothers that he was hit by the subway door, the center door.'
>
> "It was moved to strike out the answer on the ground that it was too remote and not part of the res gestae. The objection was overruled * * * The witness did not testify as to any statement made by Ryan as to when he was hit, or where upon his body or other part of him he was hit.
>
> "The evidence was certainly inadmissible as a

part of the res gestae. It does not appear when Ryan was hit by the subway door. *The res gestae was* the accident. The declaration made by Ryan was no part of it. It was not made at the time of the accident, and it does not appear that it was so nearly contemporaneous with it as to throw light upon it. Res gestae is admissible because and only because it is so connected with the event which it describes that it is a contemporaneous part of and happens with the event."

At Page 487 the same Court said,

"* * * The only testimony in the record that the deceased received any injury whatever is as we have already stated the erroneously admitted testimony that he mumbled that he had been hit by a subway door. And there is no testimony from which the kind and character of the injury, if any, could be inferred."

Galloway vs. United States, 130 Fed. 2nd 467. This Court said at page 471, Judge Garrecht writing the opinion said as follows:

"It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither the court nor the jury is permitted to give it credence * * * If the testimony introduced here by the plaintiff were contradicted by the physical facts, the trial judge was bound to direct a verdict for defendant."

Deadrich vs. United States (9 Cir.), 74 Fed. 2nd 619, 622;

Atkins vs. United States, 70 Fed. 2nd 768, 771;

United States vs. Le Duc, 48 Fed. 2nd 789, 783 (8th Cir).

Moyer vs. Aetna Life Insurance Company, 126 Fed. 2nd 141. The C. C. A. of the Third Circuit said at page 144:

> "The opinion of an expert can be of no value, when the facts of which the opinion is predicated, are not established * * *."
>
> *First National Bank vs. Wirebach, Ex'r.*, 106 Pa. 37, 44.

National Labor Relations Board vs. Standard Oil Co. et al, 124 Fed. 2nd 895. The C. C. A. of the Tenth Circuit said at page 903:

> "When the evidence is consistent with either of two inconsistent hypotheses it establishes neither."

Altmayer vs. Travelers Protective Ass'n of America, 119 Fed. 2nd 1005. The C. C. A. of the Seventh Circuit at page 1008 said:

> "* * * Circumstances shown by his evidence are consistent with a theory that insured's condition, which appears to have developed from that time forward was caused by bodily infirmity and inconsistent with any theory of accidental injury. To conclude that he suffered a violent injury on April 20 is pure speculation and without substantial support in the evidence."
>
> *Esser & Co. vs. Industrial Commission,* 211 N. W. 150;
>
> *Brown vs. Maryland Casualty Co.,* 8 Cir., 55 F. 2d 159;
>
> *Jones vs. Mutual Life Ins. Co. of New York,* 113 Fed. 2, 873.

WAIVER OR ESTOPPEL MUST BE PLEAD

Distributors Packing Co. vs. Pacific Indemnity Co., 70 Pac. 2, 253, District Court of Appeal of California said at page 255:

> "The second question is not properly presented for our consideration, for the reason that the law is settled that, where the plaintiff relies on a waiver of a breach of conditions of an insurance policy, such waiver must be alleged and evidence of the waiver is not admissible under an allegation of performance of the conditions of the contract."

Purefoy vs. Pac. Auto Indemn. Exch., 53 P. (2d) 155;

McDaniels vs. General Ins. Co., 36 Pac. 2, 829;

Cohen vs. Metropolitan Life Ins. Co., 89 Pac. 2, 732;

Malloy vs. Head, Admr., 123 A.L.R. 941;

L. Black vs. London Guarantee & Accident Co., 128 N. E. 24.

INSURED OR BENEFICIARY WILL NOT BE EXCUSED FROM GIVING NOTICE UNLESS MENTAL OR PHYSICAL CONDITION RENDERS IT IMPOSSIBLE

Long vs. Monarch Accident Ins. Co. of Springfield, Mass., 30 Fed. 2nd, 929, on page 932 the Fourth Circuit said:

> "It is true that in spite of such provisions as are contained in the policy, the law will favor the insured in exceptional cases, but he will never be completely excused from giving notice unless his mental or physical condition is actually such as to render notice impossible. The burden of proving compliance with the provisions of the policy is upon the insured or the beneficiary."

Malloy vs. Head, Adm., 123 A.L.R. 941, at 945 the Supreme Court of New Hampshire said:

> "Their failure to read or having read to remember the condition is not such accident, mistake or misfortunte as would relieve them from its operation."

The Provision with reference to notice appearing in *Malloy vs. Head, Admr.,* 123 A.L.R. 941 at 944, appears as follows:

> "D. In the event of accident written notice shall be given by or on behalf of the Assured to the Company or any of its authorized agents as soon as is reasonably possible."

In interpreting this notice the Court said at 945:

> "Beyond that, it was clearly the intent of the contract that there should be separate notices in case of accident, claim and suit. * * * it depended solely upon the plaintiffs' knowledge of the happening of the accident."

Johnson vs. Casualty Co., 60 A. 1009.

In the above case the Court said:

> "The only excuse offered for noncompliance

with the condition of the policy is that the plaintiff's failure to do so was the result of accident, mistake and misfortune."

Smith and Dove Manufacturing Company vs. Travelers Insurance Company, 50 N. E. 516:

"But his intention to send notice was interrupted by the strike which gave him a great deal of trouble. The result was that he forgot the notice or assumed it had been sent. We are of the opinion that they show neither a compliance with the condition nor an excuse for not complying with it. But such is not a compliance with the condition without which there can be no recovery at common law."

Deer Trail Consolidated Mining Company vs. Maryland Casualty Company, 36 Wn. 46:

"Johnson, an employee of plaintiff, was injured. Yarwood was plaintiff's manager. Johnson did not give the defendant notice and the plaintiff had no notice of the accident. Its manager knew nothing of the policy."

The Court at page 52 said:

"This condition of affairs was brought about solely by the neglect of the insured to notify the others of the contract and, as a matter of fact, is no excuse for failure to notify the appellant of the *accident* according to the terms of the policy."

NOTICE OF ACCIDENT NECESSARY

Korrels vs. National Accident Society, 116 N. W. 1046, the Supreme Court of Iowa at page 1047 said:

"The notice addressed to the defendant advised them that her husband was killed while crossing or getting ready to cross a railroad track."

The Court further said:

"The notice is no part of the proof, but is intended to advise the insurer that an *accident* has happened, because of which a claim will be made under the policy, to the end that the insured may prosecute inquiry into the fact of the *accident* and the circumstances thereof."

Wick vs. The Western Life & Casualty Co., 199 Pac. 272.

Allman vs. Order of United Commercial Travelers of America, 213 S. W. 429, the Supreme Court of Missouri said at page 432:

"A formal demand for an autopsy was subsequently made. It was a demand appellant had a right to make, in proper circumstances in furtherance of its preparation for trial * * * Appellant had the right to prepare for trial on all defenses. The action had been begun. There is no claim anything was said or written or done in connection with this demand which implied a waiver of anything, or that respondent took any action of any kind as a result of this demand except that her attorney rejected it."

Respectfully submitted,

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Attorney for Appellant.

FOR THE NINTH CIRCUIT

THE STANDARD ACCIDENT INSURANCE COMPANY, a corporation,

Appellant,

vs.

EDNA L. HEATFIELD,

Appellee.

No. 10517

APPELLEE'S SUPPLE
LIST OF AUTHORI

To be added to Point IV of Summary of Argument, 6 of Appellee's Brief:

National Life & Accident Insurance Company v. Hedges, (Ky.) 27 S.W. (2) 422;

Travelers Insurance Company of Chicago v. Mosle 19 L. Ed. 437;

Devlin v. Department of Labor & Industries (Wn. 78 Pac. (2) 952.

To be added to Point VI of Summary of Argument, 7 of Appellee's Brief:

National Life & Accident Insurance Company v. Hedges, (Ky.) 27 S.W. (2) 422.

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Copy received this 31st day of December, 1943.

Attorney for Appellant.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STANDARD ACCIDENT INSURANCE COMPANY, a corporation, Appellant,	)	No. 10517
vs.	)	APPELLEE'S SUPPLEMENTAL LIST OF AUTHORITIES
[illegible] L. [illegible]FIELD, Appellee.	)	

The appellee submits the following authorities and respectfully requests that they be added to the authorities cited in the brief at the pages specified:

Walters v. Spokane International Ry., [illegible] Wash. [illegible]; 1[illegible] Pac. 593.

Lucchesi v. Reynolds, 12[illegible] Wash. 352; 216 Pac. 12.

to be added to Point V. or pages 6 and 7 of Appellee's brief.

Respectfully submitted,

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Copy received this 11th
day of January, 19[illegible].

____
Attorney for Appellant.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STANDARD ACCIDENT INSURANCE COMPANY, a corporation,	)	
	)	NO. 10517
Appellant,	)	
vs.	)	
EDNA L. HEATFIELD,	)	SUPPLEMENTAL BRIEF
Appellee.	)	

Before the res gestae rule comes into being there must be evidence of an accident.

United States Fidelity & Guaranty Co. v. Flum, 270 Federal 946.

This circuit said at page 952: "It goes without saying that, in order for plaintiff to recover, there must be evidence that an accident occurred conducing to the injury."

Collins v. Equitable Life Insurance Company, 130 A.L.R.287.

The Supreme Court of West Virginia, at page 290, said:"When a statement is wholly detached from the act it would explain, it is not admissible under either the verbal act or the res gestae doctrine; but when appearances indicate that one has suffered an injury, a statement by him, if spontaneous and reasonably coincident with, and explanatory of, the occurrence, may be regarded as a part of it, and be competent evidence under the res gestae doctrine.

"Decedent's statement at the store was not made until approximately an hour after the accident. The interval of time which had elapsed and the circumstances under which that statement was made rendered it narrative and its admission erroneous."

Tillotson v. Travelers' Insurance Company, Mo. 263 S.W. 819.

At page 823 the Supreme Court of Missouri said: "To constitute proof of accidental death by drowning, as alleged in the petition, there must be substantial evidence that Tillotson accidentally fell into the water and was drowned, or that he was murderously assaulted and thrown into the river by his assailants and drowned."

Attorney for Appellant.

Service acknowledged by receipt
of copy this ___ day of
December, 1943.

Attorney for Appellee